Supreme Court of the United States.

OCTOBER TERM, 1967.

No.

MODERN LIFE INSURANCE COMPANY,
Appellant,
v.
BERNARD N. WOLFMAN,
Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

MOTION TO DISMISS OR AFFIRM.

Now comes Bernard N. Wolfman and moves to dismiss this appeal or to affirm the judgment of the Supreme Judicial Court of Massachusetts on the grounds that no substantial federal question is presented and the question on which the decision of the Court depends is so unsubstantial as not to need further argument.

Question Presented.

Is the application of the Massachusetts Unauthorized Insurer's Process Act (G.L. c. 175B) to a New York insurer—

(1) who negotiated with appellee a reduction of a life insurance policy on the life of another, replacing a policy on the life of the insured which had never

become effective, and which new policy was assigned to and delivered in Massachusetts to the appellee as absolute owner-beneficiary as a result thereof and which policy from the moment it became effective never belonged to the insured, and

(2) who engaged in other activities in Massachusetts, such as informing the owner of the policy in suit of the premiums that would become due, resulting in the payment of premiums from Boston, and arranging for a change in policy terms as to premium payments, and other activities—

constitutional under the due-process clause of the constitution?

Statement of the Case.

The statement of the case set forth in appellee's jurisdictional statement is incomplete in its summary of the dealings on March 26, 1964, between the appellee, Wolfman, and appellant's registrar, Sterlini, in that it omits reference to the fact that Wolfman telephoned Sterlini on that day and told him that he was very much disturbed that Stricker, the insured, had bought a $50,000 policy and that before proceeding with his business transaction with Stricker he wanted to be assured that a $35,000 policy would be mailed to him in Boston; that he understood a $35,000 policy was in process of being issued to replace the $50,000 policy; that he wanted the policy to be mailed to him; that Sterlini said he would try to mail the policy direct to him (Tr. pp. 46-49); that the first page of the $50,000 policy, and of the $35,000 replacement thereof, by their terms provided: "This policy shall not take effect until it has been delivered and the first premium paid during the lifetime of the in-

sured except as otherwise provided in the receipt with the same number as the application" (Exs. 4, 5).

The appellee's statement of the case as to "other communications" omits reference to the exchange of correspondence relating to a change in policy terms effected after the assignment and relating to a change in the manner of paying premiums (Exs. 11, 12, 9, 13, 14).

The opinion of the Supreme Judicial Court contains a more complete statement of the facts, and reference is hereby made thereto (Jurisd. St., App., pp. 2a-5a).

Argument.

The question presented by this appeal is not substantial, because the facts fall within the ambit of *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, and is necessarily foreclosed by the decision of this Court in that case. The instant case involves insurance; the forum state has enacted special legislation (G.L. c. 175B, The Unauthorized Insurer's Process Act, similar to that in *McGee*) to exercise its manifest interest in providing effective redress for citizens who had been injured in an activity that the state treats as exceptional and subjects to special legislation; and there were acts in the forum state by which the insurer purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Hanson* v. *Denckla*, 357 U.S. 235.

1. No Mere Assignee is Involved in This Case.

Appellant argues that jurisdiction could not be conferred on the forum state by the mere removal thereto by an insured from another state, and goes on to contend that "he

cannot create jurisdiction in the other state by removing the contract, alone, to that state, as by assignment" (Jurisd. St., p. 11). Appellant thereby implies that Wolfman, the appellee, is a mere assignee; that it had no control over the assignment of the policy to Wolfman; and that its dealings with Wolfman were those which an insurer usually and necessarily engages in once the policy is assigned. But the instant case does not involve a bare assignee. As we shall demonstrate, we are concerned here with a Massachusetts resident who negotiated with the insurer relative to the policy in suit before it became effective, and to whom the policy when issued was delivered as sole owner and beneficiary, and who, after its delivery, requested and obtained a change in policy terms relating to the payment of premiums.

a. The Contract of Insurance was Delivered in Massachusetts.

G.L. c. 175B, in section 2, bases jurisdiction on—

> "Any of the following acts in this commonwealth, effected by mail or otherwise, by an unauthorized foreign or alien insurer: (1) the issuance or delivery of contracts of insurance to residents of this commonwealth . . .; (3) the collection of premiums . . .; or (4) any other transaction of business . . ."

Appellant, in attempting to show that the necessary activities in Massachusetts were absent, concentrates only on the issue of delivery, virtually ignoring its other activities there. In this connection it assumes facts not necessarily proved; namely that delivery was made by appellant's registrar directly to its broker, Sacks, in New York, and states that it had "offered to prove that the

agent delivered the policy to the insured in New York" (*Ibid.* pp. 11, 12). The evidence thus offered was hearsay and was properly excluded (Tr. pp. 8, 10, 11). Moreover, the Massachusetts Supreme Judicial Court, in commenting on the trial Court's finding that the appellant had "caused to be delivered to the plaintiff as owner and beneficiary in Boston, Massachusetts, a $35,000 policy . . .", stated that "The judge was not obliged to believe that the policy was delivered through Sacks" (*Ibid.* App. p. 7a). The Supreme Judicial Court went on to state that "A finding that Modern Life did mail the policy to Sacks would not require a different conclusion. . . ." ". . . Stricker, after the changes of March 26, 1964, had no right to possession of the policy. Although delivery of the policy was required to make it effective, the requirement was not of delivery to the insured. . . . Modern Life had undertaken to deliver to Wolfman, [and] there is no reason to disregard the testimony of Sterlini that the mailing to Sacks was to our agent. The inference is inescapable that . . . it was with instructions to mail the policy to Wolfman" (*Ibid.* App. p. 7a).

Appellant cites *Jones* v. *Metropolitan Life Ins. Co.*, 158 Misc. 466, 286 N.Y. Supp. 4, at 7-8 (App. Term, 1st Dept. 1936) as proof that, under the "governing law" of New York, delivery by an insurer of a policy of insurance to its agent after the first premium had been paid and the application has been approved constitutes delivery to the insured (*Ibid.* pp. 11, 12). The governing law on the question of whether the conduct of activities in Massachusetts constituted such an impact upon that state as to subject the insurer to the jurisdiction of its Courts is, of course, to be determined by the laws of Massachusetts. However, *Jones* is good law anywhere—on its facts. The proposition of the *Jones* case is that, in the absence of a contrary intent, there is a presumption that the insured, as owner of the policy,

intended that the policy become effective upon release of same by the insurer after payment of the first premium, whether or not the policy was transmitted in the first instance to the insurer's agent. In the usual case, the question arises because the insured died before physical delivery of the policy to him but after its "delivery" to the agent, and the issue is whether there was delivery to the insured in his lifetime. See cases cited in Couch on Insurance, 2d, § 10:18. In *Jones* the issue was whether New York law applied on the question of a waiver argued for by the plaintiff—which issue rested on the assumption that the policy was delivered in New York by virtue of the mailing of the policy to the insurer's agent. However, mere transmittal of a policy to the insurer's agent does not *ipso facto* constitute "delivery." It is a matter of intent, *Golden* v. *Equitable Life Assur. Soc.*; 293 Mass. 286, 199 N.E. 744. If either the insurer (as by imposing a condition precedent on delivery of the policy to the insured, Couch, *op. cit.*, § 10:18) or the owner of the policy, as here by specific instructions to deliver the policy directly to him which instructions the insurer expressly agreed to comply with, directs that delivery be made only in a specified manner, delivery can become effective only if and when made in accordance with the expressed intent.[1]

2. APPELLANT'S CONDUCT OF ACTIVITIES IN MASSACHUSETTS BROUGHT IT WITHIN THE AMBIT OF THE UNAUTHORIZED INSURER'S ACT, G.L. C. 175B.

Appellant argues that "defendant registered the assignment on its books and had the kind of communications

[1] The *Jones* case is also distinguishable in that there the insured was still the owner and entitled to possession of the policy, whereas here, at the time of the purported "delivery" to Sacks for delivery to the insured, the latter was not the owner and not entitled to possession.

with plaintiff that an insurance company normally has with the assignee of one of its policies" (Jurisd. St. p. 15). It thus summarily dismisses its other dealings with Wolfman in Massachusetts. But the events on March 26, 1964, for example, were critical, and cannot be dismissed. The dealings between appellant's registrar, Sterlini, and Wolfman amounted to negotiations between them, not unlike the negotiations *de novo* for a policy of insurance. In Wolfman's discussions with Sterlini, arrangements were made to bring into existence a reduced policy of insurance (the $35,000 policy on Stricker's life), which, from the moment it became effective, would belong to Wolfman as absolute assignee and beneficiary. No policy was in effect when these conversations were initiated on that day. The situation is not different in substance from an original application by Wolfman for a $35,000 policy of insurance on Stricker's life. If there had been no abortive attempt to write a $50,000 policy, and no prior physical examination of Stricker, this is precisely what Wolfman would have been required to do. He was told to adopt the procedure laid down by Sterlini only because the prior "issuance" of the $50,000 policy and because the physical examination of Stricker had already taken place. Wolfman, in legal effect, invited the insurer to issue a $35,000 policy, which would belong to him, and him alone, from the moment it became effective, and such a policy was issued and delivered to him. The case comes squarely within *McGee*.

We must also emphasize that there were other activities by the appellant in Massachusetts. "Sterlini's telephone conversations and letters, informing the owner of the policy of the premiums that would be due (resulting in the receipt of premiums mailed in Boston) and arranging for a change in the policy terms as to premium payments, as well as the delivery of Wolfman's copy of the assignment, are acts of business (*Ibid.* App. pp. 7a, 8a, and cases cited).

3. The Balance of Conveniences do Not Deprive Massachusetts of Jurisdiction.

Appellant develops an elaborate argument that it would be more convenient to try the case in New York. It argues, without proof, that the witnesses and evidence are there located, and that Wolfman cannot prove that he will suffer hardship if he has to pursue his remedy in New York. The question is not whether it would be more convenient to try the case in New York. Rather, it is whether Massachusetts has such an interest in the case, and such power over the appellant, as to have jurisdiction over it so as to compel it to submit to the jurisdiction of its Courts. Appellant cannot complain that it would be more inconvenient to try the case in Boston rather than in New York City, a scant 200 miles away. As is pointed out in 73 Harv. L.R. 909, 928: "Finally, litigation is a normal part of the insurance company's business and should be regarded as a cost of making a profit within the forum." Moreover, the witnesses and evidence as to Stricker's state of health are not only the original examining physician, Hecht, and the doctor who issued the death certificate, but the doctors who would testify to, and other evidence as to, Stricker's actual state of health at the time he applied for insurance and his physical condition and habits between the date of his physical examination and the date of his death. We know, for example, that witnesses from one other state, at least, may be involved, because Stricker was a resident of Maryland at the time he applied for the insurance (Tr. p. 4).

As was stated by the Massachusetts Supreme Judicial Court, "Modern Life took its part in those dealings to serve its own interest in conducting its business appropriately and conveniently for those concerned with its product. This met the test of voluntary, purposeful activity, and to the extent that the test of inconvenience is applica-

ble, such inconvenience as is suggested does not make it unfair to rule that G. L. c. 175B applied to Modern Life on the facts is unconstitutional'' (Jurisd. St. App. p. 12a).

Conclusion.

For the reasons stated, it is respectfully submitted that this motion should be granted and that this appeal should be dismissed, or, in the alternative, that the judgment of the Supreme Judicial Court should be affirmed.

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